

STATE OF MICHIGAN
IN THE SUPREME COURT

BARUCH SLS, INC.,

Petitioner-Appellant,

v

TOWNSHIP OF TITTABAWASSEE,

Respondent-Appellee.

Supreme Court Docket No. _____

Court of Appeals Docket No. 319953

Michigan Tax Tribunal

Docket No. 0395010
0415093

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APPLICATION FOR LEAVE TO APPEAL BY PETITIONER-APPELLANT

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	iv
STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT	v
STATEMENT OF QUESTION PRESENTED	viii
STATEMENT OF FACTS AND MATERIAL PROCEEDINGS	1
I. INTRODUCTION AND OVERVIEW.	1
II. STATEMENT OF FACTS.	5
A. BARUCH’S MISSION AND PURPOSE.....	5
B. THE PROPERTY TAXES	16
LAW AND ARGUMENT	18
I. STANDARD OF REVIEW.....	18
II. PETITIONER IS ENTITLED TO AN EXEMPTION UNDER MCL 211.7o AND MCL 211.9 FOR <i>AD VALOREM</i> REAL AND PERSONAL PROPERTY TAXES.....	19
A. THE STATUTORY EXEMPTIONS AND LEGAL PRINCIPLES INVOLVED IN THEIR APPLICATION.	19
B. BARUCH IS A CHARITABLE INSTITUTION AND QUALIFIES FOR THE EXEMPTION FROM <i>AD VALOREM</i> REAL AND PERSONAL PROPERTY TAXES	26
1. Under the Opinion of the Tax Tribunal as overruled by the opinion of the Court of Appeals, Baruch Meets all of the <i>Wexford</i> Factors with the Exception of the Discriminatory Basis Factor.	26
2. The Court of Appeals Erred in Determining that Baruch Failed to Meet its Burden of Proof that it did not Offer its Charity on a Non-Discriminatory Basis.....	29
a. The Tax Tribunal’s Analysis	29
b. The Analysis of the Court of Appeals.....	31

III. LEAVE TO APPEAL SHOULD BE GRANTED.	38
RELIEF REQUESTED.....	40

INDEX OF AUTHORITIES

CASES

<i>Engineering Society of Detroit v Detroit</i> , 308 Mich 539; 14 NW2d 79 (1944).....	22
<i>ProMed Healthcare v City of Kalamazoo</i> , 249 Mich App 490; 644 NW2d 47 (2002).....	20
<i>Retirement Homes of Detroit Annual Conference of United Methodist Church, Inc v Sylvan Tp, Washtenaw County</i> , 416 Mich 340; 330 NW2d 682 (1982).....	24
<i>Wexford Medical Group v City of Cadillac</i> , 474 Mich 192; 713 NW2d 734 (2006).....	18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 32, 39

STATUTES

42 USC § 1395d(a)(2)(A)	16
MCL 211.7o.....	v, vii, 1, 17, 19, 22, 27, 40
MCL 211.7o(1)	19
MCL 211.9	v, vii, 1, 17, 19, 40
MCL 211.9(a)	19
Michigan General Property Tax Act (GPTA), MCL 211.1 <i>et seq.</i>	19

STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Petitioner-Appellant Baruch SLS, Inc., claims appeal from the April 21, 2015 judgment of the Michigan Court of Appeals.¹ The Court of Appeals affirmed the December 20, 2013 Final Opinion and Judgment of the Michigan Tax Tribunal which denies petitioner's request for an exemption from real and personal property taxes under MCL 211.7o and MCL 211.9 for the 2010, 2011, and 2012 tax years.²

The general issue in this action is whether Baruch is a "charitable institution" entitled to the statutory exemption from real and personal property taxes. Baruch is a Michigan non-profit corporation registered as a tax exempt organization under Section 501(c)(3) of the Internal Revenue Code, and Baruch owns and operates a number of adult-foster care and assisted living facilities throughout Michigan. The specific question presented is whether Baruch discriminates in the provision of its charity at one of those facilities. The charity afforded by Baruch is its so-called "income based" program which reduces the monthly charges assessed a resident to the income available to that resident. Ironically, the Court of Appeals sustained all of petitioner-appellant's claims of error committed by the Michigan Tax Tribunal, but affirmed on grounds wholly unsupported and contradicted by the record in this case. The Court of Appeals found that the application of Baruch's "income based" program was non-discriminatory when applied to existing residents who sought admission into the program. However, the Court of Appeals failed to appreciate that applicants, as opposed to just existing residents, are also admitted directly as

¹ The April 21, 2015 judgment is composed of two opinions. The majority opinion is *per curium*, and the Honorable Kathleen Jansen filed a separate opinion concurring in the result only. A copy of both the April 21, 2015 majority and concurring opinions Michigan Court of Appeals are included and attached as **Exhibit A**.

² A copy of the December 20, 2013 Final Opinion and Judgment of the Michigan Tax Tribunal is attached as **Exhibit B**.

residents into the income based program. Consequently, the Court of Appeals determined that the income based program was discriminatory, reasoning that because residents are required to pay something, and the income based program is only available to residents, some individuals who need charity are unable to obtain it due to their inability to pay something to become a resident. The Majority reasoned:

Instead, what ails petitioner is the stated scope of its charity care policy. Specifically, petitioner's charity care policy is not broadly defined as offering a reduced rate to all applicants unable to pay the standard market costs for this type of facility. Instead, petitioner's only stated charity care policy is the income based program, itself. *But to be eligible for the program, one must first be a resident. And to be a resident, one must have the ability to pay at the outset. If not, petitioner will not accept the applicant. This means that in order to be eligible for the income based program, one must have been able to pay, at some point, more than what government assistance would offer. Indeed, petitioner has never admitted any resident who did not in the beginning have the ability to pay more than this.* So while it is true that petitioner does not discriminate among its residents who are eligible for the income based program, entry into this charity is conditioned upon the Stone Crest residency requirements, which in turn, are conditioned on the ability to pay. This type of pay-to-play policy means petitioner does not "serve[] any person who needs the particular type of charity being offered." *Id.* at 215.

(Majority Opinion, p 5) (**Exhibit A**) (Emphasis added).

On May 12, 2015, Baruch moved the Court of Appeals for reconsideration of its April 21, 2015 judgment seeking to demonstrate to the Court of Appeals that, on the record presented, applicants are admitted directly as residents into the income based program.³ In fact, Baruch attached to its motion for reconsideration a chart taken from petitioner's trial exhibits 15, 16, and 17 demonstrating 31 residents who, based upon admission date and room rate, were admitted

³ A copy of Baruch's motion for reconsideration is attached as **Exhibit C**.

directly as applicants to the income based program.⁴ On June 12, 2015, the Court of Appeals entered its order denying reconsideration.⁵

Baruch respectfully requests that this Honorable Supreme Court enter an order reversing both the April 21, 2015 judgment of the Court of Appeals and the December 20, 2013 Final Opinion and Judgment of the Michigan Tax Tribunal and remanding this matter to the Tax Tribunal for entry of judgment in favor of Baruch and granting Baruch an exemption from *ad valorem* real and personal property taxes under MCL 211.7o and MCL 211.9 for the 2010, 2011, and 2012 tax years. Alternatively, Baruch respectfully requests an order remanding this matter for consideration of Baruch's motion for reconsideration.

⁴ See Exhibit 2 attached to Baruch's motion for reconsideration (**Exhibit C**).

⁵ The June 12, 2015 order denying reconsideration is attached as **Exhibit D**.

STATEMENT OF QUESTION PRESENTED

Petitioner-Appellant is a Michigan non-profit corporation and is recognized as having exempt status under Section 501(c)(3) of the Internal Revenue Code. Petitioner owns and operates licensed adult foster care and assisted living facilities throughout Michigan including Stone Crest Senior Living located in Freeland, Michigan. Petitioner maintains an “income based” program which sets the monthly charge for a resident based upon the resident’s available income. Baruch includes as “available income” social security funds available under the Old-Age, Survivors and Disability Insurance program and the Supplemental Security Income program. In order to qualify for the “income based” program, a resident is required to make 24 monthly payments at the regular rate charged for the room and services provided by petitioner. The 24 month requirement is waived or reduced for individuals unable to make the full 24 monthly payments. The Court of Appeals ruled that petitioner’s application of its income based program to existing residents was non-discriminatory. However, the Court of Appeals erroneously believed that petitioner did not extend its income based program to applicants by waiving the 24 month requirement in its entirety and concluded, therefore, that petitioner’s income based program discriminated by failing to serve individuals who had not paid to become eligible for the program. The record demonstrates that petitioner admits applicants into its income based program directly as residents.

WHETHER THE PETITIONER-APPELLANT IMPROPERLY DISCRIMINATES BY FAILING TO OFFER ITS CHARITY ON A DISCRIMINATORY BASIS BY CHOOSING WHO, AMONG THE GROUP IT PURPORTS TO SERVE, DESERVES THE SERVICES?

Petitioner-Appellant answers, “No.”

Respondent-Appellee answers, “Yes.”

The Tax Tribunal answered, “Yes.”

The Court of Appeals answered, “Yes.”

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

I. INTRODUCTION AND OVERVIEW.

Petitioner-Appellant Baruch SLS, Inc. (“Baruch”) appeals the April 21, 2015 judgement of the Michigan Court of Appeals. The judgment affirms the December 20, 2013 Final Opinion and Judgment of the Michigan Tax Tribunal which denied petitioner’s request for an exemption from *ad valorem* real and personal property taxes under MCL 211.7o and MCL 211.9 for the 2010, 2011, and 2012 tax years.⁶ Baruch is a Michigan non-profit corporation and is recognized as having exempt status under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). The property which is the subject of the petitions below as well as this appeal is located at 255 N. Main, Freeland, Michigan in the Township of Tittabawassee. The property is used for a licensed adult foster care home known as Stone Crest Senior Living (“Stone Crest”).

Respondent Township of Tittabawassee (“the Township”) denied Baruch’s request for an exemption, stating that Baruch had not provided sufficient evidence to support its request for exemption. Specifically, the Township stated “Not enough evidence provided for exemption” in its denial of the request for exemption for the 2011 tax year⁷ and “Not enough supporting documentation” in its denial of the request for exemption for the 2012 tax year.⁸ Baruch viewed the Township’s consideration of its requests as “summarily denying them,” and Baruch

⁶ A copy of Baruch’s petition to the Michigan Tax Tribunal for the 2010 tax year was included as Petitioner’s Exhibit (“PE”) 20. Similarly, a copy of Baruch’s petition to the Michigan Tax Tribunal for the 2011 tax year was included as PE 21. Finally, a copy of Baruch’s Entire Tribunal Motion to Amend and Consolidate which, among other things, added the 2012 tax year was included as PE 22.

⁷ The Township’s denial is included as Exhibit 2 to PE 21, and the specific basis for the denial is on Exhibit 2, Page 3 under “Reason for Board Action.”

⁸ The Township’s denial is included as Exhibit 2 to PE 22, and the specific basis for the denial is on Exhibit 2, Page 3 under “Reason for Board Action.”

mentioned specifically in its petitions to the Tax Tribunal and at the hearing held before the Tax Tribunal that multiple representatives of Baruch had attended the Board of Review proceedings in 2011, and they had presented to the Township financial statements of Baruch's entire operation, financial statements for the operation of the specific facility that is the subject of this appeal, their admissions policy and income-based program for this specific facility, and a summary of Baruch's IRS Form 990.⁹

On January 29, 2013, a hearing before the Tax Tribunal was held, and the Honorable Paul V. McCord presided. Following the hearing, Judge McCord took the matter under advisement and advised the parties that his opinion would be issued in approximately 90 days or toward the end of April. (January 29, 2013 Hearing Transcript ("HT"), pp 164-166).¹⁰ On December 20, 2013, Judge McCord issued his Final Opinion and Judgment denying the exemption.

Judge McCord concluded that Baruch had failed to meet its burden of proof to demonstrate that it is a charitable institution under the six factor test established by this Court in *Wexford Medical Group v City of Cadillac*, 474 Mich 192, 201-202; 713 NW2d 734 (2006). In particular, Judge McCord concluded that Baruch improperly discriminated by failing to serve any person who needs the charity. Judge McCord also concluded that Baruch had not established that the charges for its services were not more than is necessary for the successful maintenance of its services. Finally, Judge McCord concluded that Baruch had not established that the overall nature of its organization was charitable.

Baruch timely filed its claim of appeal to the Michigan Court of Appeals on January 10, 2014. The Court of Appeals majority disagreed with the Tax Tribunal on the last two factors, holding that Baruch had established that the charges for its services were not greater than

⁹ (PE 21, 12, 13); (PE 22 ¶¶ 18, 19); (Hearing Transcript ("HT"), pp 40-41, 121)

¹⁰ A copy of the January 29, 2013 Hearing Transcript ("HT") is attached as **Exhibit E**.

necessary for its successful maintenance and that Baruch had established that its overall nature was charitable. With respect to the discrimination factor, the majority rejected the reasoning employed by the Tax Tribunal, pointing out in footnote 1 that the record established routine accommodations and exceptions being made to both the 24 month policy and to the 25 percent availability policy that the Tax Tribunal had failed to appreciate. The majority stated:

In light of this, the Tribunal's indictment of petitioner's policy requiring 24 months of full payment before entry into the program holds no water where accommodations were routinely made. By the same token, the Tribunal's faulting petitioner's written policy of making only 25 percent of its rooms available for the income based program is misplaced where petitioner utilized nearly 40 percent of its space for that program. And in any event, the law does not require petitioner to "guarantee" the availability of its charity, as the Tribunal's opinion seems to imply. If that were so, many organizations would cease to exist as charities if their funding were insufficient to "guarantee" their services.

(Majority Opinion, p 5, footnote 1) (**Exhibit A**).

The Court of Appeals found that the application of Baruch's "income based" program was non-discriminatory when applied to existing residents who sought admission into the program. However, the Court of Appeals failed to appreciate that applicants, as opposed to just existing residents, are also admitted directly as residents into the income based program. Consequently, the Court of Appeals determined that the income based program was discriminatory, reasoning that because residents are required to pay something, and the income based program is only available to residents, some individuals who need Baruch's charity are unable to obtain it due to their inability to pay something to become a resident. The Majority reasoned:

Instead, what ails petitioner is the stated scope of its charity care policy. Specifically, petitioner's charity care policy is not broadly defined as offering a reduced rate to all applicants unable to pay the standard market costs for this type of facility. Instead, petitioner's only stated charity care policy is the income based

program, itself. *But to be eligible for the program, one must first be a resident. And to be a resident, one must have the ability to pay at the outset. If not, petitioner will not accept the applicant. This means that in order to be eligible for the income based program, one must have been able to pay, at some point, more than what government assistance would offer. Indeed, petitioner has never admitted any resident who did not in the beginning have the ability to pay more than this.* So while it is true that petitioner does not discriminate among its residents who are eligible for the income based program, entry into this charity is conditioned upon the Stone Crest residency requirements, which in turn, are conditioned on the ability to pay. This type of pay-to-play policy means petitioner does not “serve[] any person who needs the particular type of charity being offered.” *Id.* at 215.

(Majority Opinion, p 5) (**Exhibit A**) (Emphasis added).

In the Majority’s view, colored by its mistaken belief that all residents had to at some point pay more than what “governmental assistance” would offer in order to become residents and that only residents were allowed to enter the income based program, Baruch’s charity was merely subsidizing individuals who at some point had actually paid for their eligibility to be in the program.

[P]etitioner’s only charity-based activity was the subsidizing of those in the income based program, who, at some point, had already paid for their eligibility to be there.” “[T]he Legislature did not intend that housing for the elderly should be tax exempt [for] only those persons who can afford the cost of the housing benefit.” *Retirement Homes*, 416 Mich at 353 (WILLIAMS and COLEMAN, JJ., dissenting), citing *Mich Baptist Homes*, 396 Mich at 671-672. Given petitioner’s own narrow definition of charity-based activity, then, petitioner cannot clear the discriminatory basis hurdle of *Wexford*.

(Majority Opinion, p 5) (**Exhibit 1**) (footnote omitted).

In the footnote omitted from the preceding quotation, the Majority suggested that Baruch could readily clear the discriminatory basis hurdle of *Wexford* if Baruch “did subsidize other residents and more broadly defined its charity to include all those applicants who could afford to

pay something beyond government assistance, albeit less than market rate.” (Majority Opinion, p 5) (footnote 2) (**Exhibit 1**).

The fact of the matter is that, contrary to the opinion of the Majority, applicants are admitted directly into the income based program. Stated differently, one does not need to be a resident before becoming eligible for the income based program, and the record proves this to be true.

On May 12, 2015, Baruch moved the Court of Appeals for reconsideration of its April 21, 2015 judgment seeking to demonstrate to the Court of Appeals that, on the record presented, applicants are admitted directly as residents into the income based program.¹¹ Baruch attached to its motion for reconsideration a chart taken from petitioner’s trial exhibits 15, 16, and 17 demonstrating 31 residents who, based upon admission date and room rate, were admitted directly as applicants to the income based program.¹²

On June 12, 2015, the Court of Appeals entered its order denying reconsideration, and Baruch now respectfully submits this application for leave to appeal to this Honorable Supreme Court.

II. STATEMENT OF FACTS.

A. BARUCH’S MISSION AND PURPOSE

Baruch is a non-profit Michigan corporation which was incorporated in 1997 and granted tax exempt status under Section 501(c)(3) of the Internal Revenue Code on March 27, 1998. (PE

¹¹ A copy of Baruch’s motion for reconsideration is attached as **Exhibit C**.

¹² The chart was attached as Exhibit 2 to Baruch’s motion for reconsideration (**Exhibit C**). A copy of this chart is also attached as **Exhibit F** for more convenient reference.

1) (Stipulation ¶¶ 1, 3).¹³ It filed IRS Form 990, Return of Organization Exempt from Income Tax, for the years 2010 and 2011, but had not yet filed for 2012 at the time of the hearing. (HT, p 32) (PE 6, 7). Baruch owns and operates licensed adult foster care and assisted living facilities throughout Michigan, including Stone Crest Senior Living located at 255 N. Main in Freeland, Michigan (“Stone Crest”), which is the subject of this case.

Baruch utilizes a faith-based approach in caring for its residents. Its stated mission is to “honor God by providing quality senior lifestyle services that promote the value and dignity of every person.” (PE 13, ¶ 12, p 10). Baruch’s By-Laws state that its purposes are:

- 1) to provide home health care services;
- 2) to provide other senior lifestyle services to the general public;
- 3) to provide charitable services as described under the Internal Revenue Service Home for the Aged guidelines; and,
- 4) said organization is organized exclusively for charitable, educational and religious purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code.¹⁴

Baruch focuses on offering housing and services to those who need supportive care with the activities of daily living who may otherwise be unable to afford similar care. Baruch’s residents include vulnerable populations, including senior citizens and the disabled. As reflected

¹³ The parties entered into a Stipulation of Facts (“Stipulation”) prior to the January 29, 2013 hearing before the Tax Tribunal, and filed same with the Tribunal at the hearing. (HT, pp 7-8). In addition, the parties stipulated to the admission of petitioner’s exhibits with the exception of PE 8, 18, and 19. (HT, p 157). PE 8 was admitted by the Tribunal, PE 18 was not admitted, and PE 19 did not become a part of the record. (HT, pp 82-83, 119-120, 157). Respondent Township’s exhibits were either admitted by stipulation or were copies of exhibits included in petitioner’s exhibits. (HT, pp 157-158).

¹⁴ PE 2, ¶ 1.01.

in the IRS 990 forms (PE 6, 7), Baruch receives charitable contributions which it uses to help provide these populations with housing and assisted living services on an affordable basis that is less costly to the resident than what similar services cost at a for-profit private care provider. As part of this approach, Baruch offers an income based payment program. Its services, including the income based payment program, are open to all individuals requiring the care it offers as beds become available. As Connie Clauson, presently Vice President of Operations for Baruch, explained to the Tribunal, there are a number of different models for operating a charitable institution desiring to provide assistance to these populations. Baruch desired to maximize their ability to assist those who could not afford to live in assisted living and this is the reason why they developed their income based approach.

When we were designing how we wanted to assist people that had outlived their assets and could no longer live in assisted living I looked at a couple different models and there's a model out there you can just set your rates really low, so if the average rate is \$2,500 you set your rate at \$1,200 so you're helping a lot of people because it's \$1,200. However, it didn't address the fact that -- there could be people who had a lot of money and was just getting a good deal, but it didn't address the people who didn't make \$1,200, so even though the rate was low and the facility had to subsidize their operating budget another way, it still didn't take care of everyone who really didn't have money, so that didn't work for me because we wanted to be able to serve to truly the folks who couldn't afford to live in assisted living, so we went to an income-based program because then it addressed that they had Social Security, sometimes they can qualify to get SSI to go along with that, which gets us up to \$787.50 and then we could take care of almost everybody because we would base it on their income and not just at a low rate, so it was really important to us to be able to serve that whole population who didn't have the money to live other places. So that's why we went with an income-based program for our residents-assist program as to opposed to just a low rate.

(HT, pp 153-154).

Another objective of Baruch is to allow residents to remain in assisted living even when they can no longer afford to make payment for the room and services provided. The Resident Handbook (PE 13) provides at page 10 under paragraph 12 in pertinent part:

As a Christian principled non-profit organization, Baruch Senior Ministries is committed to providing care programs that are designed specifically for the needs of the residents from minimal assistance to more comprehensive care. Baruch Senior Ministries is unique in recognizing the importance and desire of a resident in never wanting to move again. To meet this need, Baruch Senior Ministries has established an Income Based Program to provide peace of mind for a resident and his or her family concerned about a resident outliving his or her assets.

The Income Based Program will reduce the monthly rent of a resident to the amount of his or her income, allowing a resident to remain at Stone Crest Assisted Living as long as he or she wishes. Stone Crest Assisted Living is licensed as an Adult Foster Care Facility with the State of Michigan; therefore Medicare, and Medicaid no not cover room and board.

Ms. Clauson explained that two of the biggest fears residents or their families face is that the resident will become either too sick or financially unable to remain in the residential setting and will be required to move out of their residence into a more restrictive setting away from the community, and the Income Based Program is specifically intended to remove that possibility and allow the resident to remain in what has become their home.

The benefits to the residents are that they do not have to leave their home or they can live in a less restrictive place and don't have to leave strictly because of finances. Probably the two biggest fears that I see in families and residents when we admit them, what happens to -- if you're the resident or to any loved one --if they become too sick or if they run out of money? I mean, those are the two biggest concerns and so part of our mission and desire was to be able to take those fears away. So we have the concept of aging in place. We allow people to stay even as their health declines and through end of life and we allow that if they outlive their assets that we will take care of them and they do not have to leave and the relief on their faces and the quality of their days and life because they don't have to have that hanging over their backs about, well, if I get too sick or if I outlive the money that I did save

is gone then I have to discharge, we continue to take care of them so families and residents are just extremely grateful and they do not hear that when they do tours at other facilities, that is not what they are told. They are told if they run out they have to leave.

(HT, pp 122-123).¹⁵

The facilities and services offered at Stone Crest are consistent with and in furtherance of Baruch's charitable purposes. Stone Crest offers a variety of care options from adult day care to specialized resident care for serious health issues. Baruch employs a chaplain and a spiritual care coordinator to oversee spiritual care activities offered at Stone Crest. The chaplain works very closely with the pastors in the Freeland area to ensure that all of the residents' needs are being met. (HT, p 105). Baruch sets its rates to ensure that even those residents who are paying the standard rate (as opposed to the income based rate) are paying a lower than market value rate in their community. Ms. Clauson testified:

We set our private pay rates based on the community they are in, the location they are in. Our rates are always less than what probably the competitors are because that's part of our mission also, is that even those who can afford to pay are paying less than market value, at least by a small percentage, so the rooms do have a rate. It is -- they are told this is our room rate. There are times when a family may say, well, you know, I don't have the funds to do that but because of our income-based program many times they can get family members to help them or other folks to help them to be able to make that 24 months or there are times when we are able to admit them straight in without them paying the 24 months depending on what percentage of income-based people we have in our building at that time.

(HT, pp 97-98).

Baruch does an analysis of the rates in the local area to ensure that its rates are set below market, but the market comparison is not a direct "apples to apples" comparison, because for-

¹⁵ In addition, those residents who require hospice and their families are also assured that they will not have to leave what has become their residence in their local community. (HT, p 104).

profit organizations, for example, charge on a level of care basis where charging increases as the level of care increases.

We do competitive analysis because we want to be sure that our rates are set correctly and we have done that in the Freeland area. It's difficult to compare apples to apples because we don't charge for level of care and the competitors in that area do charge level of care, so their base rate is either close or lower, but then they add on all these tiers of care and they add on different services, so when we really try to compare it -- and many times how we learn, a lot of it is families will come in and say, oh, I've been down the street to Barton Woods and this is what they were going to charge me or you're much less, oh, it's so much easier, it's a flat rate and we know what to do. So we've had a hard time getting it exactly compared but we do know kind of by stories that our rates are less.

(HT, pp 115-116).

In response to questioning by counsel for the Township, Ms. Clauson testified that the difference between the rates charged by for-profit assisted living facilities and Stone Crest was “around \$3,700 versus \$3,200.” (HT, p 127).

In keeping with its mission of helping adult residents live as their budget allows and to give residents and their family more predictability in planning, Baruch determined not to charge on a “level of care” basis, because “as we got to know our constituents of who we’re serving we realized that didn’t work well for their budgets and for what we are doing, so we changed [the policy] and went to a flat rate.” (HT, p 137).¹⁶

¹⁶ This testimony by Ms. Clauson came in response to the Township’s counsel’s question which pointed out that the written policy for Stone Crest allowed for Stone Crest to charge on a “level of care” basis, and she explained that that particular written requirement was inaccurate and needed to be updated. She testified:

I will be adjusting some of what’s in here. We don’t charge by the level of care, so we’re is (sic) not charging if their health declines. That’s all explained to them at admission. They understand that, that that’s not a part of what we do but the language in this general fee policy just has not been changed. (HT, p 138).

The income based program, as described in the Resident Handbook (PE 13, ¶ 12), lists the following written requirements for qualifying for the income based program.

1. A resident will have lived at Stone Crest Assisted Living and made a minimum of twenty-four (24) full monthly rent payments.
2. A resident will be required to apply for and be determined eligible for Medicaid. Michigan Department of Human Services (DHS) currently provides this benefit.
3. A resident will provide copies and information about all available income.
4. A resident will qualify for the Income Based Program beginning the calendar month after the date of notification of eligibility for Medicaid to Stone Crest Assisted Living.
5. A maximum of twenty-five percent (25%) of the available rooms at Stone Crest Assisted Living may be used for the Income Based Program at a given time.

Ms. Clauson was questioned both on direct as well as on cross-examination regarding these requirements. The requirement that the resident make 24 monthly payments at the standard room rate is regularly waived by Baruch and it is used as a guideline which allows the resident and his or her family to plan how they are going to arrange their finances.

Q. [T]he 24-month full month rent payments; is that enforced by Baruch?

A. We do have a process for making exceptions to it. We do very much use it as a guideline to help families be able to know and make the decision on whether -- how they are going to support that number but there are definitely times that the administrator who runs the facility knows that they can contact me and we go through a process

(HT, p 100-101).¹⁷

¹⁷ In fact, the records admitted at the hearing demonstrate that Baruch waives the 24 month payment requirement, as the resident in room 2A shows and admit date of 12/29/10, yet on July 1, 2011, the resident is only paying \$1018.26 per month and the standard rate for the room was

The Medicaid requirement for the income based program is to ensure that the resident who is applying for the program actually requires the assistance that the program affords.

On the admission process we do not ask for any financial information but if we are looking to do the income-based program or our reduced rate we require that they be on Medicaid because I don't want to have to be judge and jury over who's indigent and we want to take care of folks who are indigent and who need the help, but I don't want to be the one to decide it. So I know if they can get Medicaid they've gone through a process where people are looking at all those financials, and I know there are loop holes with that but that's their business. We know that they have been qualified for Medicaid and therefore they don't have the funds to be able to pay a full rate.

(HT, p 113).

Lastly, the limitation that a maximum of 25% of the available rooms at Stone Crest may be used for the Income Based Program is employed as a ready measuring stick to gauge whether exceptions to the 24 months payment requirement should be made.

Q. There was a question asked earlier about the 25 percent available rooms being used for the income-based program. I think you just mentioned that right now it's 40 percent at the Stone Crest?

A. Correct. I always set a number there because if we're in a community where let's say we only had 20 percent of our rooms were in the income-based program and someone called and they couldn't make the 24 months but I know I'm below what the board has agreed that I can have there [sic that] kind of as my minimum number, I could then waive their 24 months and bring them in directly on the income-based program because I was below that 25 percent. You know, we always want to be very careful that the folks who we are taking care of that we have those rooms available for them and we never turn them down, if they are already in our building and we were at 42 percent I wouldn't say to someone, oh, I'm sorry, I'm over my quota, you have to go somewhere else. We never, ever have done that, but if I'm below that number then I can admit someone without having them to pay because we don't have

\$3,250 per month. (HT, p 151). Similarly, the residents of room 11A and 13B also were on the income based program yet had not paid 24 monthly payments. (HT, pp 151-153).

as many people in the income-based program as what we've agreed to do. Sometimes people say, well, can I be put on that waiting list in case you drop below the 25 percent so I could come in without doing that and we absolutely do that.

(HT, p 102-103).

As with the 24 monthly payment requirement, the record demonstrates that Baruch waives the limitation that a maximum of 25% of the rooms may be used for the Income Based Program in the "spirit of the mission."

Q. And in number five it says, a maximum of 25 percent of the available rooms at Stone Crest Assisted Living may be used for the income-based program at a given time.

A. I believe we're currently over 40 percent.

Q. But again, that under the policy you would have no obligation to go beyond 25 percent?

A. But in the spirit of the mission of Baruch Senior Ministries this is the reality. The reality is that it's over 40 percent.

(HT, p p 69-70).

The reality of the situation in Freeland, Michigan, is that the need for the income based approach is great, and Baruch faithfully endeavors to fulfill its mission there.

A. [W]hat happens when we go into a community is we never know what that community's need is for income based. You know, some of our communities just have a higher need, you know, their population didn't save a lot of money for their years in living in a group home, so when we went to Freeland we really didn't know what that need would be and what we've learned is it's been very consistent since we've started, the need is very high, and they don't have the dollars to be able to pay the room rates. So our numbers there have been running about 40 percent of folks who cannot pay that regular room rate and that we do an income-based type program for them.

Q. And is that part of the charitable purpose of Baruch?

A. Absolutely. If we didn't have that income-based program -- well, we -- those folks would end up going to a much more restrictive setting, they would most likely end up in a nursing home

where Medicaid does cover some of their room costs and they would not be able to live in this residential-type setting.

(HT, p 101).¹⁸

Admission to Stone Crest is strictly on a first come first serve basis. (HT, p 135). Exceptions to the income based program requirements are not made by just anyone within the organization. Rather, there is a chain of command that must be followed that is more aptly described as "exception processing."

Q. And so by not having any written policies [addressing exceptions to the requirements,] you're saying this is left to the discretion of whomever at Baruch or Stone Crest to decide whether or not what they would do under the circumstances?

A. Well, it's not exactly left to whomever. There is a chain of command that needs to be followed and directives given, and its more exception processing, this is what we follow but there are times when there is exception decisions made following a chain of command to make those decisions.

Q. And I think you gave one example. I think it was a June 2011 entry in this exhibit. It showed that you would take someone in who had a -- you know, through a government program, you know, you had mentioned it was a reduced rate, and I noted on that -- for that month there were like five empty rooms that month. Would that have a factor, that you have that extra room and nobody is using it anyway, we could bring a person in at that time?

A. No. It's really based more on the family needed care and couldn't get in anywhere else and we wanted to be able to help them and keep them in their community and not have them have to go to perhaps Saginaw to a nursing home; that was our motivation.

(HT, p 141).

Baruch's mission and the type of care afforded residents are reduced to writing, and these written values direct their decisions regarding exceptions to the requirements.

¹⁸ The cost for a shared room in a nursing home ranges around \$6,000 to \$8,000, and allowing a resident to remain at Stone Crest saves the State of Michigan the difference between the higher cost for the nursing home stay and the reduced cost which is paid to Baruch under the income based approach. (HT, p 102).

A. We have a written mission statement and we have written values that lead and guide our organization for how to make those decisions.

Q. And those are the kind of things we've seen on the website, we've seen in your bylaws, the goals that Baruch has espoused as to what its mission is?

A. Right, we have them written other places also and we do a lot of training of our staff on that so they understand our mission and our philosophy of what type of care we give.

(HT, p 142).

From a financial standpoint, the pursuit by Baruch of its mission in Freeland at the Stone Crest facility has resulted in the significant transfer of moneys to Stone Crest. PE 23 is an exhibit prepared by Baruch which shows the direction and amount of the flow of money into Stone Crest. The \$194,339.02 sum on PE 23 is the total amount of money flowing into the Stone Crest facility for the first year from 2009 through 2010. (HT, pp 26-27). Similarly, in 2011, “there was an additional \$130,000 that went from Baruch, the corporate accounts to Stone Crest to support the mission there.” (HT, p 27). In 2012, there was another operation shortfall of \$45,000 resulting in \$475,824.23 being transferred from Baruch to its Stone Crest facility. (HT, p 28). Of the \$475,824.23, the sum of \$261,000 represents shortfalls in the operation, as opposed to acquisition, of the facility. (HT, p 28). In addition to the number included on PE 23, Baruch determined that it needed to provide additional support to the facility in the amount of \$120,000 in the coming week. (HT, p 29).

During the years 2010, 2011 and 2012, between four and eight of Stone Crest’s residents at any given time were utilizing the facility’s income based payment option. Of the 226 resident

months in 2010,¹⁹ 84 were at reduced rental rates. Similarly, in 2011, of 349 total resident months paid, 186 of those months were charged at a reduced rate. This pattern continued into 2012, where of the 342 resident months, 214, or well over half of the resident months, were charged at a discounted rate. (HT, pp 113-115).

The reduced rates charged by Baruch have an important societal benefit in that they save taxpayers from having to pay for more expensive care for many of Stone Crest's residents. When these individuals can no longer live at home, Medicaid frequently will only pay for a skilled nursing home, and even then under limited circumstances, which is far more expensive than adult foster care or assisted living facilities like Stone Crest.²⁰ See generally, 42 USC § 1395d(a)(2)(A). Because Stone Crest cares for these residents at far lower costs, the government is spared the additional tax burden of paying Medicaid expenses for more expensive nursing home care or other similar government sponsored programs for these residents. Stone Crest had seventeen Medicaid eligible residents in 2012, most of whom were the beneficiaries of some sort of charitable rent reduction.

B. THE PROPERTY TAXES

The specific property at Stone Crest consists of land and land improvements, most notably a 17,000 square foot building housing the adult foster care facility and the related personal property. Baruch purchased the Stone Crest property in December of 2009 and has been operating it as an adult foster care facility since that time. When Baruch purchased the

¹⁹ The number of residents at Stone Crest varies month to month, ranging anywhere from a few dozen residents to approximately forty. Because the number of residents changes, records are maintained based on resident months.

²⁰ It is important to note that Medicaid does not pay for adult foster care or assisted living.

property in 2009 the prior operator of the facility was being evicted and the 20 residents of the facility were concerned about their future care. (HT, p 90).

The Stone Crest property is made up of two tax identification parcels which were determined by Respondent Township of Tittabawassee (the “Township”) as having the following values:

Tax Year	Parcel Number	True Cash Value	Assessed Value	Taxable Value
2010	29-13-3-16-3007-000	\$923,000.00	\$923,000.00	\$923,000.00
2010	29-99-9-99-0211-006	\$10,000.00	\$10,000.00	\$10,000.00
2011	29-13-3-16-3007-000	\$913,000.00	\$913,000.00	\$913,000.00
2011	29-99-9-99-0211-006	\$12,500.00	\$12,500.00	\$12,500.00
2012	29-13-3-16-3007-000	\$879,600.00	\$879,000.00	\$879,600.00
2012	29-99-9-99-0211-006	\$15,000.00	\$15,000.00	\$15,000.00

Because it is a tax exempt non-profit organization, Baruch disagrees with the assessed taxable value, which it maintains should be \$0.00 for both parcels during the entire period it has owned the property. Baruch submitted an application for Property Tax Exemption to the Township in 2010 and additional petitions seeking tax exempt status to the Board of Review for 2011 and 2012 based on MCL 211.7o, MCL 211.9, MCL 211.7r and MCL 211.7d. The application and petitions were denied and taxes on the Property were assessed and paid in the following amounts:

2010	\$41,929.48
2011	\$42,112.79
2012	\$9,644.24

LAW AND ARGUMENT

I. STANDARD OF REVIEW.

Appellate review of a decision by the Michigan Tax Tribunal is multifaceted. In the absence of a fraud claim, the decision is reviewed for misapplication of the law or the adoption of a wrong principle.

The standard of review for Tax Tribunal cases is multifaceted. Where fraud is not claimed, this Court reviews the tribunal's decision for misapplication of the law or adoption of a wrong principle. *Michigan Bell Tel Co v Dep't of Treasury*, 445 Mich 470, 476; 518 NW2d 808 (1994). We deem the tribunal's factual findings conclusive if they are supported by “competent, material, and substantial evidence on the whole record.” *Id.*, citing Const. 1963, Art 6, § 28 and *Continental Cablevision v Roseville*, 430 Mich 727, 735; 425 NW2d 53 (1988). But when statutory interpretation is involved, this Court reviews the tribunal's decision *de novo*. *Danse Corp v Madison Hts*, 466 Mich 175; 644 NW2d 721 (2002).

Wexford Medical Group v City of Cadillac, 474 Mich 192, 201-202; 713 NW2d 734 (2006).

In the present case, the Tax Tribunal acknowledged specifically that “there are few disputes about facts and the main focus of the controversy are the legal issues.” (Final Opinion and Judgment, p 2). The Tax Tribunal did not state that it found either the witnesses or the documentary exhibits to lack credibility, and Baruch respectfully submits that review of the tribunal’s decision is *de novo* as it involves statutory interpretation and the proper application of law to the undisputed material facts.

II. PETITIONER IS ENTITLED TO AN EXEMPTION UNDER MCL 211.7o AND MCL 211.9 FOR AD VALOREM REAL AND PERSONAL PROPERTY TAXES.

A. THE STATUTORY EXEMPTIONS AND LEGAL PRINCIPLES INVOLVED IN THEIR APPLICATION.

The Michigan General Property Tax Act (GPTA), MCL 211.1 *et seq* provides a number of exemptions, two of which are pertinent to the present case. MCL 211.7o is the charitable institution exemption which creates the *ad valorem* property tax exemption for charitable institutions for real and personal property “owned and occupied” by a nonprofit charitable institution. MCL 211.7o(1) provides:

Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act.

The corollary statute which addresses personal property of a charitable institution, among other institutions, is MCL 211.9 which exempts the following from taxation:

The personal property of charitable, educational, and scientific institutions incorporated under the laws of this state.

MCL 211.9(a).

The Michigan Supreme Court addressed both statutes in the context of a nonprofit health care provider which sought an exemption under their provisions. *Wexford Medical Group v City of Cadillac*, 474 Mich 192, 713 NW2d 734 (2006). Both the Tax Tribunal and the Michigan Court of Appeals determined that petitioner Wexford Medical Group was not entitled to the exemptions, and the Court reversed, stating at the outset of its opinion that:

Because there is no statutory language that precludes finding petitioner exempt as a charitable institution, and because exempting petitioner on that basis fully comports with the reasoning of our previous cases, we hold that petitioner does in fact

qualify for that exemption. In refusing to grant the exemption, the Tax Tribunal adopted a wrong principle and misapplied the law by failing to distinguish *ProMed Healthcare v City of Kalamazoo*, 249 Mich App 490; 644 NW2d 47 (2002), and by focusing only on the amount of free medical services plaintiff provided. Instead, the tribunal should have considered plaintiff's unrestricted and open-access policy of providing free or below-cost care to all patients who requested it.

Wexford, 474 Mich at 195-196.

Similar to the present case,²¹ the Tax Tribunal held that while the petitioner provided charity medical care and indigent services to the community, “its primary purpose was to operate as a typical family medical practice.” *Wexford*, 474 Mich at 199. The Tax Tribunal determined that the petitioner’s situation was controlled by the earlier decision of the Michigan Court of Appeals in *ProMed Healthcare v City of Kalamazoo*, 249 Mich App 490; 644 NW2d 47 (2002).

[The Tax Tribunal] found that it could not distinguish petitioner's case from *ProMed*, *supra*. The tribunal commented:

While, unlike *ProMed*, Petitioner is able to document the number of individuals it has served under its charity care policy, serving 13 patients under that program in a two-year time period is not sufficient for a medical practice that has up to 44,000 patient visits per year.

Citing petitioner's \$10 million annual budget, the tribunal concluded that “[a] charity care write-off of approximately \$2,400 is not an appropriate level of charity care to qualify Petitioner as a charitable institution.”

Wexford, 474 Mich at 199-200.

²¹ In the present case, the Tax Tribunal noted the respondent Township’s position that, “notwithstanding the fact that Petitioner is incorporated as a nonprofit corporation, is federally tax exempt, and owns and occupies the Subject, no other aspect of Petitioner’s operations distinguishes it from a for-profit enterprise engaged in the same trade or business of providing assisted living services and amenities.” (Final Opinion and Judgment, p 9). The Tax Tribunal ultimately agreed with the Township, concluding that Baruch’s “overall manner of operations suggests that its primary objective was commercial in nature.” (Final Opinion and Judgment, p 18).

On appeal, the Michigan Court of Appeals affirmed the Tax Tribunal's determination rejecting application of the statutory exemptions to the facts before it. The Supreme Court summarized the determination of the Court of Appeals in pertinent part as follows:

The Court of Appeals held that petitioner "failed to present evidence that its 'provision of charitable medical care constituted anything more than an incidental part of its operations.' Specifically, the evidence indicated that Wexford provided no-cost services to only two people in 2000, and eleven people in 2001, which amounted to writing off \$129.13 in 2000, and \$2,229.09 in 2001." *Id.*, slip op at 2, quoting *ProMed, supra* at 500, 644 NW2d 47. The Court of Appeals was also not persuaded by petitioner's argument that it had written off losses sustained from underpayments by Medicare and Medicaid, reasoning as follows: "That the amount of payment under these programs often does not cover the cost of providing the service does not change the character of the service from service in exchange for payment to charity. Further, it is undisputed that Wexford's aim is to become profitable." *Wexford, supra* at 2. The Court was similarly unpersuaded by petitioner's argument that it was a charitable institution because it provided health care in an area deficient of such services.

With respect to whether petitioner served a public health purpose that would entitle it to *ad valorem* tax exemption, the Court also found against petitioner. The Court concluded that petitioner's "operations parallel a typical private medical clinic, rather than an organization that provides public health services" and that "the services that Wexford claims as serving public health purposes were 'inherent to the medical profession.'" *Id.* at 3. Therefore, petitioner's appeal was rejected.

Wexford, 474 Mich at 200-201 (footnote omitted.)

The Supreme Court began its analysis by observing that the case before it "tests the boundaries" of its prior decisions by "presenting a more finely tuned question." *Id.* at 202.

We must now decide precisely how, in the absence of a statutory yardstick, we should measure whether an institution is a "charitable institution" when it performs some level of charitable work. Similarly, we are asked to calculate whether an institution exists for a "public health purpose" when it engages in some level of activities designed to benefit public health. Stated differently, we must determine in which instances an organization claiming to

perform charity work or work benefiting the public health does so to an extent that would merit the respective tax exemptions, and, importantly, whether there are any concrete parameters that can be imposed to assist with these inquiries.

Wexford, 474 Mich at 202.

Because the term “charitable institution” was undefined in the statute, judicial construction was required. After considering its prior decision in *Engineering Society of Detroit v Detroit*, 308 Mich 539, 550; 14 NW2d 79 (1944) together with amendments to the statute subsequent to the prior decision, the Court set forth the following “revised test” for the present wording of MCL 211.7o:

- (1) The real estate must be owned and occupied by the exemption claimant;
- (2) the exemption claimant must be a nonprofit charitable institution; and
- (3) the exemption exists only when the buildings and other property thereon are occupied by the claimant solely for the purposes for which it was incorporated.

Wexford, 474 Mich at 203.

On the facts before it, there was no dispute as to factors (1) or (3), nor was there any dispute concerning whether petitioner was a nonprofit corporation. Rather, the question before the Court was whether petitioner was a “‘charitable institution,’ and, in a more general sense, what precise meaning that term has.” *Id.* at 204.

Following a detailed and thorough review of the prior cases addressing the question, the Court identified several “common threads” present in the line of cases reviewed. First, the Court determined that it was inappropriate to focus upon a particular facet or activity of the institution, as the proper inquiry is whether the institution, as a whole, should be considered a charitable one.

First, it is clear that the institution's activities as a whole must be examined; it is improper to focus on one particular facet or

activity. In that sense, the inquiry pertains more to whether an institution could be considered a “charitable” one, rather than whether the institution offers charity or performs charitable work. So it is the overall nature of the institution, as opposed to its specific activities, that should be evaluated.

Wexford, 474 Mich at 212-213.

The second principle distilled from the Court’s prior decisions on the question was that the institution must offer its charitable deeds on a non-discriminatory basis.

A second indispensable principle is that the organization must offer its charitable deeds to benefit people who need the type of charity being offered. In a general sense, there can be no restrictions on those who are afforded the benefit of the institution's charitable deeds. This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought. Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group. The charitable institution's reach and preclusions must be gauged in terms of the type and scope of charity it offers.

Wexford, 474 Mich at 213.

Lastly, the Court observed that each case is unique and merits separate examination without imposition of a threshold qualifying percentage of time or resources devoted to charity before the organization qualifies for the exemption.

Consequently, there can be no threshold imposed under the statute. The Legislature provided no measuring device with which to gauge an institution's charitable composition, and we cannot presuppose the existence of one. To say that an institution must devote a certain percentage of its time or resources to charity before it merits a tax exemption places an artificial parameter on the charitable institution statute that is unsanctioned by the Legislature.

Wexford, 474 Mich at 213.

The question of whether to apply a monetary threshold was one more suited for the legislature given the inherent difficulties and choices to be made in that determination.

[T]he difficulties with formulating a monetary threshold illuminate why setting one is the Legislature's purview, not the courts'. To set such a threshold, significant questions would have to be grappled with. For instance, a court would have to determine how to account for the indigent who do not identify themselves as such but who nonetheless fail to pay. A court would have to determine whether facilities that provide vital health care should be treated more leniently than some other type of charity because of the nature of its work, or even if a health care provider in an underserved area, such as petitioner, is more deserving of exemption than one serving an area of lesser need. ***A court would need to consider whether to premise the exemption on whether the institution had a surplus and whether providing below-cost care constitutes charity.*** Clearly, courts are unequipped to handle these and many other unanswered questions. Simply put, these are matters for the Legislature.

Wexford, 474 Mich at 214 (emphasis added).

The Court concluded that the definition of “charity” articulated in its prior decision in *Retirement Homes of Detroit Annual Conference of United Methodist Church, Inc v Sylvan Twsp, Washtenaw County*, 416 Mich 340; 330 NW2d 682 (1982) accurately conveyed what a claimant must show to be granted a tax exemption as a charitable institution.

We conclude that the definition set forth in *Retirement Homes*, *supra* at 348–349, 330 NW2d 682, sufficiently encapsulates, without adding language to the statute, what a claimant must show to be granted a tax exemption as a charitable institution:

“[Charity] * * * [is] a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government.” [*Id.*, quoting *Jackson v Phillips*, 96 Mass (14 Allen) 539 (1867) (emphasis deleted; alterations in original).]

Wexford, 474 Mich at 214.

The Court identified the following factors which should be considered when determining whether an organization is a “charitable institution” in light of the definition of “charity:”

- (1) A “charitable institution” must be a nonprofit institution.
- (2) A “charitable institution” is one that is organized chiefly, if not solely, for charity.
- (3) A “charitable institution” does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a “charitable institution” serves any person who needs the particular type of charity being offered.
- (4) A “charitable institution” brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.
- (5) A “charitable institution” can charge for its services as long as the charges are not more than what is needed for its successful maintenance.
- (6) A “charitable institution” need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a “charitable institution” regardless of how much money it devotes to charitable activities in a particular year.

Wexford, 474 Mich at 215.

The Court held that on the record presented the petitioner was a charitable institution. Petitioner was organized as a charitable institution, and as reflected in its statement of purpose contained in its bylaws, devoted itself to charitable works as a whole. The petitioner’s charity program was offered on a free and reduced cost basis to indigents with no restrictions under an open-access policy without preferential treatment.

Although petitioner sustains notable financial losses by not restricting the number of Medicare and Medicaid patients it accepts, it bears those losses rather than restricting its treatment of patients who cannot afford to pay.

Petitioner more closely matches the hospitals examined in *R B Smith, supra*, and *Michigan Sanitarium, supra*, hospitals we found qualified for the charitable institution exemption. Just as in those cases, the overall nature of petitioner's organization is charitable. The losses the institution sustains are not fully subsidized by the patients, but by petitioner's parent corporations, patients who can afford to pay, and, to some extent, by government reimbursements. And the fact that petitioner receives government reimbursements has little bearing on the analysis because, despite any government aid, the beneficiary of the medical care receives a gift. *See, e.g., Huron Residential Services v. Pittsfield Charter Twp.*, 152 Mich App 54, 393 NW2d 568 (1986) (holding that a petitioner who received approximately 99 percent of its revenues from state funding was a charitable institution because the residents did not pay full value for the services rendered and, thus, received a charitable gift from the petitioner).

Wexford, 474 Mich at 216-217 (footnote omitted).

The Court reversed the determinations of the Tax Tribunal and Court of Appeal, concluding:

In sum, the Tax Tribunal and Court of Appeals erred by denying petitioner's request for tax exemption as a charitable institution. Petitioner satisfies the concepts we have previously set forth with respect to what a claimant must show to be found "charitable." *See Retirement Homes, supra* at 348-349; 330 NW2d 682. Petitioner provides a gift—free or below-cost health care—to an indefinite number of people by relieving them of disease or suffering.

Wexford, 474 Mich at 220-221.

B. BARUCH IS A CHARITABLE INSTITUTION AND QUALIFIES FOR THE EXEMPTION FROM AD VALOREM REAL AND PERSONAL PROPERTY TAXES .

1. Under the Opinion of the Tax Tribunal as overruled by the opinion of the Court of Appeals, Baruch Meets all of the *Wexford* Factors with the Exception of the Discriminatory Basis Factor.

In the present case, the Tax Tribunal began its legal analysis of the statutory exemptions with the three factors identified by the Supreme Court in *Wexford*.

In *Wexford Medical Group v City of Cadillac*, 474 Mich 192; 713 NW2d 734 (2006), the Supreme Court presented the test for determining if an organization is a charitable one under MCL 211.7o (such is the same test for an educational exemption) and required that:

- (1) the real estate must be owned and occupied by the exemption claimant;
- (2) the exemption claimant must be a nonprofit charitable institution;
- (3) the exemption exists only when the building and other property thereon are occupied by the claimant solely for the purpose for which it was incorporated.

(Final Opinion and Judgment, p 9).

As there was no dispute that Baruch is a non-profit corporation and recognized as such for federal income tax purposes, the Tax Tribunal identified the two questions which remained:

- (1) whether Petitioner “occupies” the Subject solely in furtherance of its exempt purpose, and
- (2) whether Petitioner [is] a “charitable institution” within the meaning of that term in MCL 211.7o(1).

(Final Opinion and Judgment, p 9).

The Tax Tribunal determined that Baruch occupied the subject property, reasoning in pertinent part that:

In regard to Stone Crest Management, LLC, the Tribunal finds persuasive Petitioner's explanation that Petitioner acquired Stone Crest Management, LLC solely to maintain the licensing for the facility, and Petitioner is the sole member of the LLC. (TR at 93-96). Pursuant to this licensing, Petitioner, through its affiliate, is licensed as an adult foster care facility under the Adult Foster Care Facility Licensing Act, 1979 PA 218. There is no indication that Petitioner occupies the assisted living facility known as Stone Crest for anything other than the purposes for which it was incorporated and there is also no indication that either Leisure Living, Stone Crest Management LLC, or any other for-profit entity is operating out of the subject property. Accordingly, we find that Petitioner meets factors (1) and (3).

(Final Opinion and Judgment, p 10).

The Tax Tribunal then turned its attention to address the remaining question of whether Baruch was a charitable institution and again looked to the *Wexford* decision for guidance. The Tax Tribunal determined on the record presented that Baruch met three of the six factors. Baruch, as stipulated by the parties, is a nonprofit organization under both Michigan and Federal law. (Final Opinion and Order, p 11) (**Exhibit B**). Although Baruch respectfully disagreed with the Tax Tribunal's analysis,²² the Tax Tribunal determined that Baruch was organized chiefly, if not solely for charity. (Final Opinion and Order, p 14) (**Exhibit B**). Lastly, the Tax Tribunal determined that Baruch engaged in charitable acts such as bringing people's minds or hearts under the influence of religion through its religious and spiritual support services as well as relieving people's bodies from disease, suffering or constraint through the provision of meals, housekeeping, social activities, medical assistance, medical monitoring and other adult foster care services. (Final Opinion and Order, p 16) (**Exhibit B**).

Although the Tax Tribunal determined that Baruch did not meet its burden of proof that its charges for services were not more than what is needed for its successful maintenance, the Court of Appeals disagreed, holding that this factor was satisfied. (Majority Opinion, p 6) (**Exhibit A**). Similarly, the Court of Appeals concluded contrary to the Tax Tribunal that Baruch's overall nature is charitable. (Majority Opinion, p 6) (**Exhibit A**).

²² See pages 26 through 29 of Baruch's Brief on Appeal.

2. The Court of Appeals Erred in Determining that Baruch Failed to Meet its Burden of Proof that it did not Offer its Charity on a Non-Discriminatory Basis.

a. The Tax Tribunal's Analysis

While the Tax Tribunal expressly acknowledged that Baruch asserts that its services are available to all regardless of their ability to pay, that a large percentage of the rent payments made in any given year are discounted charitable rents, and that Baruch does not discriminate on the basis of any protected-class (race, color creed, religion, national or ethnic origin, sex, sexual orientation, gender identity, or physical ability,) the Tax Tribunal held that, “That, however, does not make its policies any less discriminatory.” (Final Opinion and Judgment, p 15). In the Tribunal’s view, Baruch “appears to have placed obstacles in the way of those who needed and may have availed themselves of charity.” (*Id.*) The Tribunal cited the written requirement that 24 months’ rent be paid to qualify for the income based program and the requirement that the resident be eligible for Medicaid, and concluded that, “as a result, Petitioner’s charity is not freely available to the general public and aged population.” (*Id.*) The Tribunal elaborated:

It is understood that Petitioner is not able to provide reduced rent to every resident who applies for it and it is not [sic]²³ offered on a first-come, first-serve basis. Petitioner requires that a resident seeking participation in its income based program be approved for Medicaid. (TR at 113). This is because, according to Petitioner, Medicaid eligible residents have already been determined by a separate agency not to have funds available to pay the full rate. Further, by written policy, Petitioner does extend its income based programs to residents who have not first made full payment for the 24 consecutive months and not admit new residents directly on its income based program, although there have been accommodations made to policy on an ad-hoc basis. (TR at 100). That said, the actual decision making process for making such departures from its stated policy was not explained at the hearing. We recognize

²³ The word “not” in this sentence is believed to be a typographical error, as the testimony expressly stated that rooms are offered on a first come, first serve basis. (HT, p 135).

that Petitioner has extended participation in this program beyond the policy's state[d] maximum to as much as 40 percent of its resident population who cannot pay the regular room rate. Yet, there is no guarantee of its availability to all who seek it, and particularly, in the case of an individual seeking such "charity" when the 25 percent threshold has been exceeded, too speculative.

Baruch argued to the Court of Appeals that the Tax Tribunal's ruling creates an impossible burden for an organization to qualify as a "charitable institution." Under the Tax Tribunal's analysis, in order to qualify as a "charitable institution," the organization must offer services at no charge and maintain a position where the organization is able to "guarantee availability" of these rooms for "all who seek it." In other words, while Baruch has planned for and intends to make available 25 percent of its rooms for residents on the income-based program, it is simply not possible to have every room occupied by residents on the income based program. Ironically, one of the very purposes of the requirement is to ensure that Baruch is in a position to accommodate existing residents who unexpectedly need to go on the income based program.

Connie Clauson testified:

Q. There was a question asked earlier about the 25 percent available rooms being used for the income-based program. I think you just mentioned that right now it's 40 percent at the Stone Crest?

A. Correct. I always set a number there because if we're in a community where let's say we only had 20 percent of our rooms were in the income-based program and someone called and they couldn't make the 24 months but I know I'm below what the board has agreed that I can have there kind of as my minimum number, I could then waive their 24 months and bring them in directly on the income-based program because I was below that 25 percent. *You know, we always want to be very careful that the folks who we are taking care of that we have those rooms available for them and we never turn them down, if they are already in our building and we were at 42 percent I wouldn't say to someone, oh, I'm sorry, I'm over my quota, you have to go somewhere else.* We never, ever have done that, but if I'm below that number then I can admit someone without having them to pay because we don't have as many people in the income-based program as what we've agreed

to do. Sometimes people say, well, can I be put on that waiting list in case you drop below the 25 percent so I could come in without doing that and we absolutely do that.

(HT, pp 102-103).

There is nothing discriminatory about Baruch's income based program, nor any evidence of discrimination in the record. There is no evidence that any resident was denied either a room at the facility or participation in the income based program. To the contrary, the evidence shows that far too many residents were admitted to the income based program than the facility can itself sustain through operations, and a significant shortfall has occurred in each of its first three years of operation. The evidence also establishes that this over admission and consequent shortfall is not likely to end, since the only explanation, apart from speculation and conjecture, given on the record is that Freeland is one of those communities where the need is great.

b. The Analysis of the Court of Appeals

The Majority rejected the analysis of the Tax Tribunal. The Majority recognized that the 24 month rental requirement and the 25 percent room availability requirement were guidelines set to ensure, as Connie Clauson testified, the viability of Baruch and its ability to continue to provide services to those who need and depend upon them.²⁴

²⁴ The 24 month requirement is also designed to allow families of potential residents know what is expected under the program in order to both sustain the program and to maximize the number of individuals able to be served under the program. Connie Clauson testified that the 24 month requirement is a "guideline to help families be able to know and make the decision on whether – how they are going to support that number." (HT, p 100) (**Exhibit E**). Baruch desires especially to support those who truly need the support and, for example, do not have family members financially able and willing to support them. Family support is triggered by this 24 month requirement, but if the family is unwilling or unable to provide that support, Baruch has a process for making exceptions to the 24 month requirement. Baruch has no independent means for determining whether family members are willing or able to provide the financial support other than to present the 24 month requirement and to waive it if they express concern about being able to meet the requirement.

Indeed, petitioner does not discriminate among its residents eligible for its income based payment program. The same criteria apply to all. Moreover, “a nonprofit corporation will not be disqualified for a charitable exemption because it charges those who can afford to pay for its services as long as the charges approximate the cost of service.” *Wexford*, 474 Mich at 210 (quotation marks and citation omitted).

(Majority Opinion, pp 4-5) (footnote omitted) (**Exhibit A**).

In the footnote omitted from the preceding quotation, the Majority specifically rejected the Tax Tribunal’s analysis regarding the 24 month requirement and the 25 percent room availability requirement.

In light of this, the Tribunal’s indictment of petitioner’s policy requiring 24 months of full payment before entry into the program holds no water where accommodations were routinely made. By the same token, the Tribunal’s faulting petitioner’s written policy of making only 25 percent of its rooms available for the income based program is misplaced where petitioner utilized nearly 40 percent of its space for that program. And in any event, the law does not require petitioner to “guarantee” the availability of its charity, as the Tribunal’s opinion seems to imply. If that were so, many organizations would cease to exist as charities if their funding were insufficient to “guarantee” their services.

(Majority Opinion, p 4) (footnote 1) (**Exhibit A**).

The Majority, nevertheless, affirmed the Tribunal’s determination that petitioner was not a charitable institution entitled to the exemption “because on this record petitioner could not establish that it did not offer its charity on a nondiscriminatory basis.” (Majority Opinion, p 7). The Majority mistakenly believed that on the record presented no applicant had been admitted directly into the income based program as a resident. Rather, the Majority believed that in order to be eligible for the income based program, one must first be a resident.²⁵ The Majority also

²⁵ Baruch respectfully submits that the Majority misconstrued the evidence regarding waivers or exceptions to the 24 month requirement. That testimony is applicable to applicants as well as to existing residents, as the requirement can and has been reduced from 24 months to 0 months. Stated differently, where there is a need, one need not be a resident to be admitted into the

mistakenly believed that no resident had ever been admitted without the ability to pay, at some point, more than what government assistance would offer. The Majority reasoned that Baruch discriminated in its residency eligibility requirements which the majority believed from its reading of the record required an applicant to have some ability to pay more than what governmental assistance would offer. Therefore, according to the Majority, petitioner necessarily discriminates, since petitioner's charity does not serve any person who needs it, specifically, individuals unable to pay more than what governmental assistance would offer.

Instead, what ails petitioner is the stated scope of its charity care policy. Specifically, petitioner's charity care policy is not broadly defined as offering a reduced rate to all applicants unable to pay the standard market costs for this type of facility. Instead, petitioner's only stated charity care policy is the income based program, itself. ***But to be eligible for the program, one must first be a resident. And to be a resident, one must have the ability to pay at the outset. If not, petitioner will not accept the applicant. This means that in order to be eligible for the income based program, one must have been able to pay, at some point, more than what government assistance would offer. Indeed, petitioner has never admitted any resident who did not in the beginning have the ability to pay more than this.*** So while it is true that petitioner does not discriminate among its residents who are eligible for the income based program, entry into this charity is conditioned upon the Stone Crest residency requirements, which in turn, are conditioned on the ability to pay. This type of pay-to-play policy means petitioner does not "serve[] any person who needs the particular type of charity being offered." *Id.* at 215.

(Majority Opinion, p 5).

Contrary to the Majority's mistaken belief, the record demonstrates that Baruch admits applicants directly into the income based program as residents in precisely the same manner as it admits existing residents to the income based program. In order to demonstrate that the record

income based program. This is no different than how the policy is applied to existing residents, as where there is a need, the 24 month requirement may be shortened. The Majority found the 24 month policy non-discriminatory when applied to residents, and on the record presented, the finding should be the same with respect to applicants.

proves these direct admissions into the income based program, Baruch prepared a chart which contained information taken from the monthly master census records which were admitted into evidence as petitioner's trial exhibits 15, 16, and 17. The monthly master census records show for each room at the facility whether the room is occupied, the admission date of the occupant, the basic or standard rate for the particular room, and the rate that is actually being charged to the resident. The chart, which was attached to Baruch's motion for reconsideration as Exhibit 2 and is also attached as **Exhibit F** shows 31 residents who, based upon admission date and room rate, were admitted directly as applicants to the income based program. Baruch respectfully submits that the Court of Appeals clearly erred in determining that one must first be a resident before one is eligible for the income based program. While the income based program does include the requirement that an individual be a resident for 24 months, the 24 month requirement is waived in precisely the same manner for residents and non-residents alike.

In addition, it is simply inaccurate to say that, "to be a resident, one must have the ability to pay at the outset." The fact of the matter is that, given social security, all have some ability to pay, and the requisite payment is determined by the individual's ability to pay. Contrary to the Majority's opinion, there simply is no circumstance where, to be eligible, "one must have been able to pay, at some point, more than what government assistance would offer."²⁶ As Connie Clauson testified, the "income based" system was designed precisely because all who need the charity "have some form of income" because of social security.

Q. There was a question raised concerning no resident being able to -- or being allowed to come into the facility without some sort of payment and I think your response was that because all

²⁶ If by "government assistance," the majority means to include social security, then the statement is wholly inaccurate, since petitioner defines "income" to include this governmental assistance, and the income based program is literally tailored to set the charges at an amount equal to this "government assistance."

residents have some income. Could you explain that because that's an issue that was raised in the brief by the respondent, that there's no one that has -- that doesn't pay anything and you -- again, you mentioned that people have income; can you explain that?

A. Yeah. Because we're serving elderly or disabled individual those folks have qualified for Social Security either through the disability program or the older American program, so they do have some income. . . .

(Hearing Tr, pp 152-153).

Ms. Clauson continued and explained that the very basis for designing the program was to enable the charity to be provided to those whose only income was the minimum social security to which all individuals are entitled to receive.

When we were designing how we wanted to assist people that had outlived their assets and could no longer live in assisted living I looked at a couple different models and there's a model out there you can just set your rates really low, so if the average rate is \$2,500 you set your rate at \$1,200 so you're helping a lot of people because it's \$1,200. However, it didn't address the fact that -- there could be people who had a lot of money and was just getting a good deal, but it didn't address the people who didn't make \$1,200, so even though the rate was low and the facility had to subsidize their operating budget another way, it still didn't take care of everyone who really didn't have money, so that didn't work for me because we wanted to be able to serve to truly the folks who couldn't afford to live in assisted living, *so we went to an income-based program because then it addressed that they had Social Security, sometimes they can qualify to get SSI to go along with that, which gets us up to \$787.50* and then we could take care of almost everybody because we would base it on their income and not just at a low rate, so it was really important to us to be able to serve that whole population who didn't have the money to live other places. So that's why we went with an income-based program for our residents-assist program as to opposed to just a low rate.

(Hearing Tr, pp 153-154) (Emphasis added).

On the record presented, there is no “government assistance” apart from social security which could be used to fund the service provided by petitioner to residents as a general matter.²⁷ Ironically, Baruch uses the phrase “income based” because it matches the amount of the charges to the “income” available to the applicant. Ms. Clauson explained how this worked in the context of an actual resident whose room and rate information was included on the master census admitted at trial as follows:

That person was charged \$1,000 -- \$1,018.26. The source would be -- we would have had that person supply us with what their income is so they would have given us a bank statement or their Social Security letter saying here's what my Social Security is and because it's over the minimum amount that the State says we have to take or could take for adult foster care they would have received \$64 a month personal cash, so we would have taken their total Social Security or total income minus \$64 for personal cash and set their rent for that room at \$1,018.

(Hearing Tr, p 110).

In other words, Baruch calculates the charge for its services based upon the “income” available to the applicant. “Income” is not social security plus other income; rather, “income” is social security less what the State requires be provided to the resident for “personal cash.” Baruch’s charity income based program is based upon the fact (unchallenged on the record in

²⁷ Apart from social security, assuming that social security is regarded by this Court of Appeals as a “government assistance,” there were only two types of government assistance discussed on the record which individuals could use while a resident. One was hospice services, which are paid by Medicare and which is available just as it would be to an individual “residing in their own home.” (Hearing Tr, p 104). The other was the My Choice Waiver program which was created by the State of Michigan and which was an initiative by the State “to get folks out of the nursing home where the State was paying the difference between \$1,018 and 6,000 or 8,000 or 10,000 to get them into a less restrictive setting where they wouldn’t have to pay that kind of Medicaid.” (Hearing Tr, pp 110-111). As Ms. Clauson explained, “So they (the State) are trying to get people into the assisted living arena so they sent to us as operators, we’ll pay you some personal care dollars if you will take folks who are on Medicaid and who have very low incomes.” (Hearing Tr, p 111). Neither Medicare nor Medicaid provide benefits to assisted living or adult foster care services.

this case) that all persons desiring adult foster care services have some income in the form of social security, and the income based program sets the charges based solely on that income. There is nothing in the record that suggests even remotely that Baruch turns away applicants who do not have income in addition to social security, nor is there anything in the record which suggests that Baruch turns away applicants who have insufficient social security income. Rather, the testimony and evidence establishes the Baruch admits applicants to become residents under the income based program based solely on their available income (i.e. social security) and sets the charges according to the available social security income. There simply is no discrimination against those who have insufficient income; rather the charges are set according to the income/social security available to that person.

In summary, and contrary to the majority opinion, one need not first be a resident in order to be eligible for the income based program. On the record presented, applicants are admitted directly to become residents under the income based program. Nor is it accurate to say that one must have the ability to pay at the outset in order to become a resident. Rather, on the record presented, all applicants have some income in the form of social security and hence some ability to pay. There is absolutely no evidence that petitioner would ever or has ever rejected an applicant based upon the lack of the “ability to pay at the outset.” Rather, the unrefuted evidence is that Baruch designed and implements its income based program precisely because all applicants have some ability to pay as a result of social security and the fact that the services are for adult foster care.

The Court of Appeals determined that Baruch’s income based program was non-discriminatory as applied to existing residents. Contrary to Court of Appeals’ determination, Baruch administers its income based program towards applicants in precisely the same non-

discriminatory manner as Baruch employs with respect to existing residents. Baruch's income based program is non-discriminatory.

III. LEAVE TO APPEAL SHOULD BE GRANTED.

Baruch seeks leave to appeal on the grounds that the decision of the Court of Appeals is clearly erroneous and will cause material injustice.

Baruch respectfully submits that the decision of the Court of Appeals is clearly erroneous for the reasons stated earlier in this application. The decision will cause material injustice to Baruch not only with respect to the Stone Crest facility but with respect to the other facilities owned and operated by Baruch throughout the State of Michigan. There are proceedings presently pending concerning ten other Baruch facilities involving the same issues as involved in the present proceeding. Of those ten proceedings, three have been held in abeyance by the Michigan Tax Tribunal pending the outcome in this matter, and the remaining seven are in earlier stages of the proceedings.

Although the opinion in the present case is unpublished, it will likely be regarded as authoritative and controlling by the Tax Tribunal in the other cases. Baruch envisions special difficulties in attempting to persuade the Tax Tribunal Judges in those matters that the Court of Appeals made a mistake in the reading of the record in this matter when the Court of Appeals declined to consider Baruch's motion for reconsideration. Absent the correction by this Court of the errors which Baruch respectfully submits were committed by the Court of Appeals, Baruch is facing the prospect of numerous and lengthy legal battles over its income based charity program while at the same time having to pay significant *ad valorem* real and personal property taxes from which it should be exempt. This presents a real and significant danger that Baruch will be unable to sustain its operations.

Baruch also seeks leave to appeal on the grounds that the question presented involves legal principles of major significance to the state's jurisprudence. Although the decision of the Court of Appeals is unpublished, the availability of unpublished decisions and the dearth of published decisions addressing what it means for a charity to offer its charity on a discriminatory versus non-discriminatory basis, makes the decision in the present case significant and one which this Court should address. Baruch respectfully submits that the decision of the Court of Appeals is confusing even apart from the error asserted by Baruch in this application. For example, the Majority states in footnote 2 on page 6 of its opinion that:

Assuming petitioner did subsidize other residents and more broadly defined its charity to include all those applicants who could afford to pay something beyond government assistance, albeit less than the market rate, petitioner would have no problem clearing the discriminatory basis hurdle of *Wexford*. We cannot reach that conclusion on the record before us today, however.

Query whether the Majority is suggesting that Baruch could cure the discrimination problem by redefining its income based program to exclude those who could not afford to pay something beyond government assistance, albeit less than the market rate? Baruch presently does endeavor to keep its rates below market rate, and there is certainly nothing in the record that suggests that Baruch's rates are at or higher than market rate when services are compared on an apples to apples basis where charges remain constant despite increased level of care. Baruch presently extends its income based program to applicants who *cannot* afford to pay something beyond government assistance, and it is a confusing suggestion or implication that Baruch may under the Majority's analysis remove the discriminatory basis problem by eliminating those whom Baruch presently serves.

RELIEF REQUESTED

Petitioner-Appellant Baruch SLS, Inc., respectfully requests that this Honorable Supreme Court enter an order reversing both the April 21, 2015 judgment of the Court of Appeals and the December 20, 2013 Final Opinion and Judgment of the Michigan Tax Tribunal and remanding this matter to the Tax Tribunal for entry of judgment in favor of petitioner and granting petitioner an exemption from *ad valorem* real and personal property taxes under MCL 211.7o and MCL 211.9 for the 2010, 2011, and 2012 tax years. Alternatively, Baruch respectfully requests an order remanding this matter for consideration of Baruch's motion for reconsideration.

Respectfully submitted,

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Dated: July 24, 2015

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